

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

REINHOLD (KEN) BENDER and
JUDY BENDER,

Plaintiffs,

vs.

Case No. 2005-3526-CK

DAVID TAPPER, JUDY TAPPER,
REMAX ADVANTAGE ONE, INC.,
and FRANK J. KOY,

Defendants.

OPINION AND ORDER

Defendants ReMax Advantage One, Inc., and Frank J. Koy (hereinafter "Defendants") have filed a motion for summary disposition pursuant to MCR 2.116(C)(10).¹ Plaintiffs request the Court deny Defendants' motion, and enter summary disposition in their favor pursuant to MCR 2.116(I)(2).

This matter arises out of Plaintiffs' purchase of co-defendants' David Tapper and Judy Tappers' home located on a canal leading to Lake St. Clair. The home has a boat well, dock, and hoist. In May 2005, Plaintiffs listed their home for sale with Defendant ReMax. The Plaintiffs saw the home, and viewed it on the same day. Later that day, Plaintiffs submitted an offer to purchase the property, and the Tappers accepted. The purchase agreement stated that the purchase was contingent upon Plaintiffs obtaining a satisfactory inspection of the premises

¹ The Court will refer to ReMax Advantage One, Inc., as "Defendant ReMax", and Frank J. Koy as "Defendant Koy". For simplicity, the Court will refer to Defendant ReMax and Defendant Koy collectively as "Defendants".



within seven days. Plaintiffs obtained an inspection of the property, and the sale closed on June 28, 2005. On July 8, 2005, the Tappers vacated the property.

Plaintiffs filed their complaint against Defendants on September 1, 2005. Plaintiffs' filed a first amended complaint on November 7, 2005. Plaintiffs' first amended complaint alleges negligent, innocent, or intentional fraud relating to the weight capacity of the boat hoist in count 1; and negligent, innocent, or intentional fraud relating to water leaks in the basement in count 2.

Defendants contend that summary disposition is appropriate on the basis that Plaintiffs cannot establish a prima facie claim for fraud since there is no evidence to establish Defendants knowingly made false or reckless representations regarding the boat hoist. Defendants also contend that Plaintiffs cannot establish reasonable reliance since they had the means to determine whether the alleged misrepresentations relating to the boat hoist were true. Defendants further contend that Plaintiffs cannot establish they were damaged by the alleged misrepresentations since Plaintiffs' boat could not fit in the well. Defendants finally contend that Plaintiffs' claims for fraud are barred based upon the property being purchased "as is".

Plaintiffs contend that the evidence establishes conclusively that Defendants made misrepresentations relating to the weight capacity of the boat hoist, and that the "as is" clause does not insulate them from liability for fraud.

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively

admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

In order to establish a prima facie claim of fraud, the plaintiff must establish (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. *Belle Isle Grill Co v City of Detroit*, 256 Mich App 463, 477; 666 NW2d 271 (2003). Plaintiff's reliance on a false representation must be reasonable to support a fraud claim. *Novak v Nationwide Mutual Insurance Co*, 235 Mich App 675, 689-691; 599 NW2d 546 (1999); *Bergen v Baker*, 264 Mich App 376, 389; 691 NW2d 770 (2004). A claim for negligent misrepresentation requires justifiable reliance to one's detriment on information prepared without reasonable care by one who owed the relying party a duty of care. *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 502; 686 NW2d 770 (2004). A claim of innocent misrepresentation eliminates the need to prove a fraudulent purpose, or an intent on the part of defendant that the misrepresentation be acted upon by plaintiff. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 118; 313 NW2d 77 (1981).

In an "as is" contract, the buyer generally bears the risk of loss unless the sellers fail to disclose concealed defects known to them. *Conahan v Fisher*, 186 Mich App 48, 49; 463 NW2d 118 (1990). Caveat emptor prevails in land sales, and the vendors, with two exceptions, are not liable for any harm due to defects existing at the time of sale. *Id.* The exception relevant to plaintiffs' action for fraudulent concealment is that the vendors have a duty to disclose to the

purchasers any concealed conditions known to them that involve an unreasonable danger. *Id.*, at 49-50; see also *Clemens v. Lesnek*, 200 Mich App 456, 459-460; 505 NW2d 283 (1993). However, where evidence demonstrates a competent inspector should reasonably have been expected to have discovered the defective conditions, the conditions are not concealed, and there can be no recovery for fraudulent concealment in connection with the sale of real estate. See *Conahan, supra* at 50.

In the case at hand, it is clear that the boat hoist's weight limitation was easily established through inspection. Plaintiff has provided the Court with a letter from the manufacturer of the hoist indicating that his inspection has revealed the hoist to be 4-ton, upgradeable to 12-ton. It is also clear that the evidence presented establishes that Plaintiffs had the opportunity to inspect the boat hoist and boat well prior to closing. Reinhold Bender testified at his deposition that after he inquired about whether the boat hoist would handle his 36 foot Carver boat, Mr. Tapper indicated that he could bring the boat over and test it out. (Rein. Bender Dep., p. 68). Mr. Bender also testified that he asked his inspector to look at the hoist, but he indicated he did not "do maritime things". (Rein. Bender Dep., p. 38). Plaintiffs eventually had the boat hoist inspected, but after the closing. Plaintiffs' explanation that they did not have the boat hoist inspected because the closing documents prevented him from doing so is not supported by the documents. Consequently, Plaintiffs clearly had the opportunity to inspect the boat hoist and determine its weight limitations, thereby making their reliance upon the alleged misrepresentations made by Defendants unreasonable. Plaintiffs' claim on this issue is also barred pursuant to the "as is" clause of the contract since the condition was readily observable.

Therefore, Defendants' motion for summary disposition of Plaintiffs' claim for fraud relating to the boat hoist should be granted.²

The Court is satisfied however that Defendants have failed to present sufficient evidence or argument that Plaintiffs' claim for fraud relating to the alleged leaky basement should be granted. Defendants have merely mentioned in a footnote that Plaintiffs' claim for fraud includes an allegation regarding water in the basement. The Court finds that Defendants have not sufficiently presented the issue before the Court or to put Plaintiffs on notice of any potential argument on the issue. A party may not simply announce a position and leave it up to the Court to find support for the claim. *Wilson v. Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Consequently, Defendants motion for summary disposition on this issue should be denied.

Based upon the reasons set forth above, Defendants' ReMax Advantage One, Inc., and Frank J. Koy's motion for summary disposition is GRANTED on the issue of the boat hoist. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

Dated: July 5, 2006

DONALD G. MILLER
Circuit Court Judge

CC: Richard E. Segal
Anthony Urbani II
Richard P. Smith

DONALD G. MILLER
CIRCUIT JUDGE

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BY:  Court Clerk

² The Court is also satisfied that Plaintiff has failed to present any evidence to support a finding that Defendants had knowledge that the boat hoist had a capacity of 10-15 tons, or that they made the representations recklessly. Consequently, summary disposition is appropriate on this basis as well for these Defendants.